REMARKS

I. PRELIMINARY REMARKS AND AMENDMENTS

The claim amendments and following remarks were previously submitted in the response filed on March 31, 2008, and are included herewith solely for the Examiner's convenience.

With this response, claims 53, 74, 78 and 82 have been amended in accordance with the suggestion of the Examiner to correct Troxol with Trolox and to insert the recitation that the oxygen radical absorbance capacity is measured in micromoles of Trolox equivalents (TE) /gram fresh weight basis. Claims 51, 54, 71, 72, 75, 76, 79, 80, 82 and 83 have also been amended to recite the Latinate names of the berries.

II. THE OUTSTANDING REJECTIONS

Claims 51-53 and 71-83 stand rejected under 35 U.S.C. §112 (second paragraph) as being indefinite.

Claims 51-53 and 71-83 stand rejected under 35 U.S.C. §102 (a) as being anticipated by Cape Cod Biolabs (V).

Claims 51-53 and 71-83 stand rejected under 35 U.S.C. §102 (b) as being anticipated by Powrie et al., US 2001/0053404 as evidenced by Shanbrom, US 2002/0117403; Ou et al., US 7,132,296; Wang et al. J. Agric. Food Chem 48:140-146 (2000) and Mann, US 2001/0012525.

Claims 51-53, 71 and 76-79 stand rejected under 35 U.S.C. §102 (b or e) as being anticipated by Nair et al., WO 01/15533 (N) or Nair et al., US 6,818,234 (E) as evidenced by the teachings of Prior et al. J. Agric. Food Chem. 46:2686-2693 (1998).

Claims 51-53 and 71-83 stand rejected under 35 U.S.C. §102 (e) as being anticipated by Heeg et al., US 2002/0168430.

Claims 53, 74, 78 and 82 are objected to as containing a typographical error.

III. PATENTABILITY ARGUMENTS

A. The Rejection under 35 U.S.C. §112(second paragraph) Should be Withdrawn.

The rejections for indefiniteness under 35 U.S.C. §112 (second paragraph) should be withdrawn for the following reasons.

1. Aqueous Extract

The rejection under 35 U.S.C. §112 (second paragraph) should be withdrawn because those of ordinary skill in the art reviewing the disclosure of the application would understand that "an extract of berries" would use an aqueous alcohol solvent (see the January 25, 2007 Declaration Dr. Debasis Bagchi) and that the part of the plant treated would be the "berries." Moreover, the specification (at para. [0049]) teaches the availability of the preferred known compositions from InterHealth Nutraceuticals. Accordingly, those of ordinary skill would recognize what is and what is not encompassed by the claims in compliance with the requirements of 35 U.S.C. §112 (second paragraph).

2. Unit of Capacity for Trolox Equivalents

The rejection of claims 53, 74 and 82 as being indefinite for reciting radical absorbance capacities in units of "Trolox equivalents/gram fresh weight" can be withdrawn in light of the amendment of those claims to recite that the radical absorbance capacities are measured in units of "micromole Trolox equivalents (TE) per gram." These amendments are supported in the original disclosure including at para. [0083] describing and incorporating by reference the ORAC assays of Cao et al., *Free Radic. Biol.* Med. 14, 303-11 (1993) and do not introduce new matter.

3. Combinations of Two or More Berries

The rejections of claims 71, 75, 79 and 80 should be withdrawn because the recitations of those claims spelling out the approximate concentrations of each and every one of the different berry extracts. That is, claim 71 specifies that all (not just some of) the recited berry extracts be present in the recited concentration. Thus, the indefiniteness rejection under 35 U.S.C. §112 (second paragraph) should be withdrawn.

4. Measurement by Weight

With respect to claims 71, 75, 79 and 83 the rejection should be withdrawn because those claims do set forth that the percentage amounts are "by weight."

5. Presentation of Latinate Names

Further, claims 51, 54, 71, 72, 75, 76, 79, 80 and 83 have now been amended to recite the identification of wild blueberry and wild bilberry by their Latin names. Accordingly, the rejection under 35 U.S.C. §112 (second paragraph) should be withdrawn.

B. The Objection to Claims 53, 74, 78 and 82 Should be Withdrawn.

The objection to claims 53, 74, 78 and 82 should be withdrawn in light of the amendment of those claims to correct the obvious typographical error in the spelling of Trolox.

C. The Art-based Rejections under 35 U.S.C. §102(a), (b) and (e) Should be Withdrawn.

The rejections of claims 51-53 and 71-83 over one or more of Cape Cod Biolabs (V); Powrie et al., US 2001/0053404; Nair et al., WO 01/15533 (N) or Nair et al., US 6,818,234 and/or Heeg et al., US 2002/-168430 should be withdrawn.

1. The Rejection of Claims 51-53 and 71-83 under 35 U.S.C. §102 (a) as being anticipated by Cape Cod Biolabs (V) Should Be Withdrawn.

The rejection of claims 51-53 and 71-83 over Cape Cod Biolabs should be withdrawn because there is no teaching in the reference that the components are derived from "wild" berries as required by the claims. The Action reads the components as being wild extracts "absent evidence to the contrary" but in the absence of any evidence that the Cape Cod Biolabs berries are ever wild berries it is improper to use the disclosure as an anticipating reference. The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic. *In re Rijckaert*, 9 F.3d 1531, 1534, 28 USPQ2d 1955, 1957 (Fed. Cir. 1993) To establish inherency, the extrinsic evidence "must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or

possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient." *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999)

Moreover, Cape Cod Biolabs specifies that its products are produced "with no chemical solvents..." (page 2, fifth full paragraph, line 4). As such, it is not clear how the Cape Cod Biolabs materials can be "extracts" at all much less those extracted with an aqueous alcohol solvent.

Finally, each of claims 71, 75 and 79 recited specific combinations of berry extracts including extracts of berries (e.g., (strawberry, cranberry raspberry and elderberry (claims 71 and 79)), and (strawberry, and raspberry (claim 75))) and which are not present in the Cape Cod Biolabs disclosure whereby there can be no anticipation! Similarly, there is no disclosure or teaching in Cape Cod Biolabs of the specifically recited ingredient proportions.

For these reasons, the Section 102 rejection of claims 51-53 and 71-83 over Cape Cod Biolabs should be withdrawn.

2. The Rejection of Claims 51-53 and 71-83 under 35 U.S.C. §102(b) as being anticipated by Powrie et al., US 2001/0053404 as evidenced by Shanbrom, US 2002/0117403; Ou et al., US 7,132,296; Wang et al. J. Agric. Food Chem 48:140-146 (2000) and Mann, US 2001/0012525 Should Be Withdrawn.

The rejection of claims 51-53 and 71-83 as being anticipated by Powrie et al., US 2001/0053404 as evidenced by Shanbrom, US 2002/0117403; Ou et al., US 7,132,296; Wang et al. J. Agric. Food Chem 48:140-146 (2000) and Mann, US 2001/0012525 should be withdrawn because Powrie teaches juice compositions and not berry extracts. As a consequence there is no basis for the assertion that the Powrie juice compositions (which are different from the claimed subject matter) would inherently have the claimed antioxidant capacities. Finally, Table 3 of Ou et al., which actually relates to "extracts," as distinguished from the juices of Table 2, teaches away from the claimed subject matter having above 40 Trolox equivalents (TE) /gram by disclosing that extracts such as bilberry and elderberry

extracts only have oxygen radical absorbance capacities of only about 2-3 Trolox equivalents/gram.[1]

Finally, each of claims 71, 75 and 79 recited specific combinations of berry extracts including extracts of berries (e.g., strawberry (claims 71, 75 and 79)), and (elderberry (claims 71 and 79)) and bilberry (claim 71))) and which are not present in the Powrie disclosure whereby there can be no anticipation! Similarly, there is no disclosure or teaching in Powrie of the specifically recited ingredient proportions.

For these reasons, the Section 102 anticipation rejections of claims 51-53 and 71-83 over Powrie, Shanbrom, Ou, Wang and Mann should be withdrawn.

3. The Rejection of 51-53, 71 and 76-79 stand rejected under 35 U.S.C. §102 (b or e) as being anticipated by Nair et al., WO 01/15533 (N) or Nair et al., US 6,818,234 (E) as evidenced by the teachings of Prior et al. J. Agric. Food Chem 46:2686-2693 (1998) Should Be Withdrawn.

The rejection of 51-53, 71 and 76-79 stand rejected under 35 U.S.C. §102 (b or e) as being anticipated by Nair et al., WO 01/15533 (N) or Nair et al., US 6,818,234 (E) as evidenced by the teachings of Prior et al. J. Agric. Food Chem 46:2686-2693 (1998) should be withdrawn should be withdrawn because the Nair references disclose a number of extraction procedures but there is no evidence that the extract of bilberry was a wild bilberry extract or that either it or the elderberry was the same as the claimed aqueous ethanolic extract. Moreover, there is no evidence that the combination of those two extracts at a greater than 10:1 ratio (32 mg elderberry, 2 mg bilberry and 0.4 mg tart cherry extract) will actually have the claimed property wherein "the composition has a higher antioxidant capacity than any one berry extract used in the composition."

Finally, each of claims 71 and 79 recited specific combinations of berry extracts including extracts of berries (e.g., blueberry and strawberry and cranberry (claims 71 and 79)) and bilberry (claim 71))) and which are not present in the Nair compositions whereby there can be no anticipation! Similarly, there is no disclosure or teaching in Nair of the specifically recited ingredient proportions.

[1] Table 3 presents Trolox data in units of "micromole Trolox equivalent per liter" hence the numbers in Table 3 must be divided by a factor of 1000 to yield "per gram."

For these reasons, the Section 102 anticipation rejections of claims 51-53 and 71 and 76-79 over the Nair references and Prior should be withdrawn.

4. The Rejection of Rejection of 51-53 and 71-83 stand rejected under 35 U.S.C. §102 (e) as being anticipated by Heeg et al., US 2002/0168430 Should Be Withdrawn.

The anticipation rejection of claims 51-53 and 71-83 as being anticipated by Heeg et al., US 2002/0168430 should be withdrawn because Heeg is directed to seed oils and not to berry extracts much less aqueous alcoholic extracts.

Finally, each of claims 71, 75 and 79 recited specific combinations of berry extracts including extracts of berries (e.g., elderberry (claim 71)), and (bilberry (claims 71 and 75)) and cranberry and elderberry (claim 79))) and which are not present in the Heeg seed oil composition disclosure whereby there can be no anticipation! Similarly, there is no disclosure or teaching in Heeg of the specifically recited ingredient proportions.

CONCLUSION

In view of the above amendment and remarks, and the specification document as stipulated in the notice, applicants believe the pending application is in condition for allowance. Should the Examiner wish to discuss any issues of form or substance in order to expedite allowance of the pending application, she is invited to contact the undersigned at the number indicated below.

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Respectfully submitted,

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